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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 20

[REG-118913-21]

RIN 1545-BQ22

Estate and Gift Taxes; Limitation on the Special Rule Regarding a Difference in the Basic Exclusion Amount

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the Estate Tax Regulations relating to the basic exclusion amount (BEA) applicable to the computation of Federal estate and gift taxes. The proposed regulations affect the estates of decedents dying after a reduction in the BEA who made certain types of gifts after 2017 and before a reduction in the BEA.

DATES: Written or electronic comments and requests for a public hearing must be received by [**INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. Requests for a public hearing must be submitted as prescribed in the "Comments and Requests for a Public Hearing" section.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at https://www.regulations.gov (indicate IRS and REG-118913-21) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through the mail. Until further notice, any comments submitted on paper will be considered to

the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket. Send paper submissions to: CC:PA:LPD:PR (REG-118913-21), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, John D. MacEachen at (202) 317-6859; concerning submissions of comments, the public hearing, and the access code to attend the hearing by telephone, Regina Johnson at (202) 317-5177 (not toll-free numbers) or by sending an email to Publichearings@irs.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 11061 of the Tax Cuts and Jobs Act, Pub. L. 115-97, 131 Stat. 2054, 2091 (2017) (TCJA), amended section 2010(c)(3) of the Internal Revenue Code (Code) to provide that, for decedents dying and gifts made after December 31, 2017, and before January 1, 2026, the BEA is increased by $5 million to $10 million as adjusted for inflation (increased BEA). Under the TCJA, on January 1, 2026, the BEA will revert to $5 million as adjusted for inflation.

Section 11061 of the TCJA also added new section 2001(g)(2) to the general statute of the Code that imposes the Federal estate tax. Section 2001(g)(2) grants the Secretary of the Treasury or her delegate (Secretary) authority to prescribe such regulations as may be necessary or appropriate to carry out section 2001 with respect to any difference between the BEA applicable at the time of a decedent's death and the BEA applicable with respect to any gifts made by the decedent. This specific authority is in addition to the Secretary's preexisting authority under section 2010(c)(6) to

prescribe such regulations as may be necessary or appropriate to carry out section 2010(c).

On November 26, 2019, the Treasury Department and the IRS published final regulations under section 2010 (TD 9884) in the **Federal Register** (84 FR 64995) to address situations described in section 2001(g)(2) (final regulations). The final regulations adopted §20.2010-1(c), a special rule (special rule) applicable in cases where the credit against the estate tax that is attributable to the BEA is less at the date of death than the sum of the credits attributable to the BEA allowable in computing gift tax payable within the meaning of section 2001(b)(2) with regard to the decedent's lifetime gifts. In such cases, the portion of the credit against the net tentative estate tax that is attributable to the BEA is based on the sum of the credits attributable to the BEA allowable in computing gift tax payable regarding the decedent's lifetime gifts. The rule ensures that the estate of a donor is not taxed on completed gifts that, as a result of the increased BEA, were free of gift tax when made. The preamble to the final regulations stated that further consideration would be given to the issue of whether gifts that are not true inter vivos transfers, but rather are includible in the gross estate, should be excepted from the special rule, and that any proposal addressing this issue would benefit from notice and comment.

This document contains proposed amendments to the Estate Tax Regulations (26 CFR part 20) relating to the BEA described in section 2010(c)(3) of the Code (proposed regulations), for which purpose the final regulations reserved §20.2010-1(c)(3). The special rule currently does not distinguish between: (i) completed gifts that are treated as adjusted taxable gifts for estate tax purposes and that, by definition, are not included in the donor's gross estate; and (ii) completed gifts that are treated as testamentary transfers for estate tax purposes and are included in the donor's gross estate (includible gift). The Code and the regulations, however, do distinguish between

these two types of transfers. Section 2001(b) (flush language) excludes from the term "adjusted taxable gifts" gifts that are includible in the gross estate. Section 2701(e)(6) and §25.2701-5 similarly remove from adjusted taxable gifts transfers includible in the gross estate that previously were subject to the special valuation rules of section 2701. See also §25.2702-6 (excluding from adjusted taxable gifts certain transfers includible in the gross estate that previously were subject to the special valuation rules of section 2702) and Rev. Rul. 84-25, 1984-1 C.B. 191 (excluding from adjusted taxable gifts completed transfers that will be satisfied with assets includible in the gross estate). In keeping with the statutory distinction between completed gifts that are treated as adjusted taxable gifts and completed gifts that are treated as testamentary transfers, these proposed regulations generally would deny the benefit of the special rule to includible gifts.

Regardless of whether a gift is treated as an adjusted taxable gift or as an includible gift for estate tax purposes, the Code ensures that the gift is treated consistently with respect to the credits allowable in the year in which the gift was made. See discussion of the five statutory steps of the estate tax computation in part III, Federal Estate Tax Computation Generally, in the Background section of the preamble to the notice of proposed rulemaking under section 2010 (REG-106706-18) published in the **Federal Register** (83 FR 59343) on November 23, 2018. The exclusion from adjusted taxable gifts of transfers includible in the gross estate does not affect the second step of the estate tax computation, the determination of a hypothetical gift tax referred to as the gift tax payable. Gift tax payable is based upon all post-1976 taxable gifts, whether or not included in the gross estate. See sections 2001(b)(2) and (g)(1), requiring the determination of a hypothetical gift tax on all post-1976 taxable gifts, which is a gift tax reduced, but not to below zero, by the credit amounts allowable in the years of the gifts. Both the hypothetical gift tax and the credit amounts are computed using

the gift tax rates in effect at the date of death. Thus, for purposes of computing the estate tax, an includible gift receives credit for all credit amounts, including those attributable to the increased BEA, allowable in the years in which the gift was made.

A commenter recommended consideration of whether the special rule should apply to taxable gifts made during an increased BEA period that are essentially testamentary and thus are included in the gross estate rather than in adjusted taxable gifts. See discussion in part 6, Anti-Abuse Rule, of the Summary of Comments and Explanation of Revisions in the final regulations. If such transfers are subject to the special rule, they can be made in a manner designed to make the increased BEA available against the donor's estate tax despite the fact that the donor has retained the beneficial use of or the control of the transferred property. Examples of such transfers include gifts subject to a retained life estate or subject to other powers or interests as described in sections 2035 through 2038 and 2042 of the Code, gifts made by enforceable promise as described in Rev. Rul. 84-25, supra, and gifts subject to the special valuation rules of sections 2701 and 2702. In recommending an exception to the special rule, the commenter cautioned that attention should also be given to the potential to work around an exception that relies solely on whether gifts are includible in the gross estate. For example, a donor may attempt to make the increased BEA available against the estate tax under the special rule by the removal shortly before the donor's death of the donor's beneficial use of or the control of the transferred property. Examples of these types of transfers include the elimination by a third party, shortly before the donor's death, of the interests or powers that otherwise would have resulted in the inclusion of the transferred interest or property in the donor's gross estate; the payment shortly before death of a gift made by enforceable promise as described in Rev. Rul. 84-25, supra; and the transfer shortly before death of a section 2701 interest

within the meaning of §25.2701-5(a)(4) or a section 2702 interest within the meaning of §25.2702-6(a)(1).

The purpose of the special rule is to ensure that bona fide inter vivos transfers of property are consistently treated as a transfer of property by gift for both gift and estate tax purposes. Bona fide inter vivos gifts are subject to the gift tax based on the values, gift tax rates, and exclusions applicable as of the date of the gift. While such a gift is treated as an adjusted taxable gift for purposes of determining the estate tax rate to be applied to the value of the taxable estate, the gift is not includible in the donor's gross estate at death and is not subject to the estate tax. The special rule avoids the imposition of the estate tax on the gift by ensuring that the gifted property is treated solely as an adjusted taxable gift and not also as property includible in the gross estate.

Unlike an adjusted taxable gift, however, a gift of property that is includible in the donor's gross estate is subject to estate tax based on the values, estate tax rates, and exclusions applicable as of the date of death. The Code itself ensures that an includible gift is not treated as both an adjusted taxable gift and an inclusion in the gross estate. See section 2001(b) (flush language), excluding from "adjusted taxable gifts" gifts that are includible in the gross estate. The Code also ensures that an includible gift receives credit for any credit amounts allowable in the years in which the gift was made. See sections 2001(b)(2) and (g)(1). The treatment of an includible gift for estate tax purposes results in the correct outcome without any application of the special rule: the property is included in the gross estate and subject to the BEA in effect at the donor's death.

There is a subset of includible gifts that the Code treats in a different fashion, but still in a way that results in the correct outcome without the application of the special rule. That subset consists of gifts made during an increased BEA period that are essentially testamentary, but the entire value of which is deductible for gift tax purposes

by reason of the charitable or marital deduction (or both). Such transfers are excluded from adjusted taxable gifts because they never were taxable gifts in the first place. See section 2503(a), defining taxable gifts as the total amount of gifts made during the calendar year less the deductions provided in sections 2522 and 2523 for charitable and marital gifts, respectively. As a result of the exclusion of charitable and marital gifts from taxable gifts, and thus from adjusted taxable gifts, there would be no credits allocable to these gifts attributable to the BEA in computing gift tax payable within the meaning of section 2001(b)(2). Because no BEA is applicable to the deductible gifts, there will be no difference between the BEA applicable to these gifts attributable to the increased BEA and the BEA applicable to the decedent's estate. As a result, there is no possibility of inconsistent gift and estate taxation of such an includible gift, and thus no need for the application of the special rule.

Without additional rules, however, the application of the special rule to includible gifts results in securing the benefit of the increased BEA in circumstances where the donor continues to have the title, possession, use, benefit, control, or enjoyment of the transferred property during life. In those circumstances, there is no possibility of the inclusion of the gift in adjusted taxable gifts at the death of the donor, and therefore no need for the application of the special rule to transfers of such property. In those circumstances, it is appropriate that the amount includible or treated as includible as part of the gross estate (rather than as an adjusted taxable gift) is subject to estate tax with the benefit of only the BEA available at the date of death. Section 2001(g)(2) directs the Secretary to prescribe such regulations as may be necessary or appropriate to carry out section 2001 with respect to any difference between the BEA applicable at the time of the decedent's death and the BEA applicable with respect to any gifts made by the decedent. Given the plain language of the Code describing the computation of the estate tax and directing that certain transfers, including transfers made within three

years of death that otherwise would have been includible in the gross estate, are treated as testamentary transfers and not as adjusted taxable gifts, it would be inappropriate to apply the special rule to includible gifts. This is particularly true where the inter vivos transfers are not true bona fide transfers in which the decedent "absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property." Commissioner v. Church's Estate, 335 U.S. 632, 645 (1949). To prevent this inappropriate result, these proposed regulations would create an exception to the special rule applicable to includible gifts.

The same commenter suggested that any exception to the special rule relating to transfers within the scope of section 2701 be specifically addressed in §25.2701-5. This suggestion is not adopted. Section 25.2701-5(a)(3) provides rules under which the estate of a decedent who made a transfer subject to section 2701 may reduce the decedent's adjusted taxable gifts in a manner similar to that of section 2001(b) so as to eliminate the amount duplicated in the transfer tax base. The amount of the reduction in adjusted taxable gifts is determined under §25.2701-5(b). See also §25.2702-6(b), providing a similar rule for certain interests previously subject to section 2702. Both §§25.2701-5 and 25.2702-6 address only the amount of adjusted taxable gifts but, with the exception of §25.2701-5(e)(3), do not address the amount of the credits allowable in the multiple steps necessary to determine the estate tax. As previously discussed, the effect of the estate tax computation is to provide the decedent the benefit of any credit amounts allowable in the years of the gifts, determined at date of death gift tax rates, including the credit amount attributable to a section 2701 or 2702 transfer that was free of gift tax when made as a result of the increased BEA, regardless of whether the amount of adjusted taxable gifts is later reduced for estate tax purposes. Thus, while a reduction in the amount of adjusted taxable gifts eliminates amounts duplicated in the

transfer tax base, it neither changes the existence of the transfer nor frees up the credit allocable to that transfer. See, e.g., the Background section of the preamble to Adjustments Under Special Valuation Rules (TD 8536), published in the **Federal Register** (59 FR 23152) on May 5, 1994, explaining that the §25.2701-5 regulations do not "purge" a section 2701 transfer as if it had not occurred, but rather mitigate the effect of double taxation through a reduction in a decedent's adjusted taxable gifts.

As noted earlier, §25.2701-5(e)(3) permits an adjustment to both the adjusted taxable gifts and gift tax payable of a consenting spouse. In the case of an election under section 2513 to split a section 2701 transfer with the donor's spouse, a later testamentary transfer of the section 2701 interest is treated as made solely by the donor spouse. The consenting spouse's adjusted taxable gifts and gift tax payable are each reduced to eliminate any remaining effect of the section 2701 interest on the consenting spouse in a manner that is generally consistent with the principles of sections 2001(d) and (e) (pertaining to the treatment of split gifts in the computation of the estate tax). This exception has no application to the donor spouse, who remains subject to the general rule of §25.2701-5(a)(3). Thus, it is not necessary to address differences in the BEA in either §25.2701-5 or §25.2702-6(b).

Explanation of Provisions

Pursuant to sections 2010(c)(6) and 2001(g)(2) of the Code, the proposed regulations would add proposed §20.2010-1(c)(3) to provide an exception to the special rule for transfers that are includible in the gross estate or are treated as includible in the gross estate for purposes of section 2001(b), including for example gifts subject to a retained life estate or subject to other powers or interests as described in sections 2035 through 2038 and 2042 of the Code regardless of whether the transfer was deductible pursuant to section 2522 or 2523, gifts made by enforceable promise, and other amounts that are duplicated in the transfer tax base, including a section 2701 interest

within the meaning of §25.2701-5(a)(4) and a section 2702 interest within the meaning of §25.2702-6(a)(1). The exception to the special rule also would apply to transfers that would be described in the preceding sentence but for the transfer, elimination, or relinquishment within 18 months of the donor's date of death of the interest or power that would have caused inclusion in the gross estate, effectively allowing the donor to retain the enjoyment of the property for life. In addition to transfers, eliminations, or relinquishments by the donor, examples include the elimination, by a third party having the power to eliminate or extinguish the interest or power, of the interests or powers that otherwise would have resulted in inclusion of transferred property in the donor's gross estate; the payment of a gift made by enforceable promise as described in Rev. Rul. 84-25, supra; and the transfer of a section 2701 interest within the meaning of §25.2701-5(a)(4) or a section 2702 interest within the meaning of §25.2702-6(a)(1). For purposes of the preceding sentence, such transfers, eliminations, and relinquishments include those effectuated by the donor, the donor in conjunction with any other person, or by any other person, but do not include those effectuated by the expiration of the period described in the original instrument of transfer, whether by a death or the lapse of time.

The special rule, however, would continue to apply to transfers includible in the gross estate when the taxable amount of the gift is not material, that is, the taxable amount is 5 percent or less of the total amount of the transfer, valued as of the date of the transfer. Compare section 2037(a)(2), excluding from the gross estate property subject to a reversionary interest where the value of such interest immediately before death is 5 percent or less of the value of the transferred property; and section 2042(2), excluding from the term "incidents of ownership" reversionary interests where the value of such interest immediately before death is 5 percent or less of the value of the life insurance policy. See also section 673(a), treating the grantor as the owner for income tax purposes of any portion of a trust in which the grantor's reversionary interest

exceeds 5 percent of the value of such portion as of the date of inception of that portion of the trust. This bright-line exception to the special rule is proposed in lieu of a facts and circumstances determination of whether a particular transfer was intended to take advantage of the increased BEA without depriving the donor of the use and enjoyment of the property.

The proposed exception to the special rule may be illustrated by the following example. Assume that when the BEA was $11.4 million, a donor gratuitously transferred the donor's enforceable $9 million promissory note to the donor's child. The transfer constituted a completed gift of $9 million. On the donor's death, the assets that are to be used to satisfy the note are part of the donor's gross estate, with the result that the note is treated as includible in the gross estate for purposes of section 2001(b). Thus, the $9 million gift is excluded from adjusted taxable gifts in computing the tentative estate tax under section 2001(b)(1). Nonetheless, if the donor dies after a statutory reduction in the BEA to $6.8 million, the credit to be applied in computing the estate tax is the credit based upon the $6.8 million of the BEA allowable as of the date of death.

Applicability Date

Once these regulations have been published as final regulations, it is proposed that these regulations be applicable to the estates of decedents dying on or after [**INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. The special rule will not be needed until the basic exclusion amount has been decreased by statute; under current law, that is scheduled to occur for the estates of decedents dying after 2025. However, if such a decrease is enacted on or after [**INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER**] but before the issuance of final regulations, the best way to ensure that all estates will be subject to the same rules is to make this proposed exception to the special rule applicable to the estates of decedents

dying on or after [**INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

Special Analyses

These proposed regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. These proposed regulations apply to donors of gifts made after 2017 and to the estates of donors dying after a reduction in the BEA, and implement a change in the amount that is excluded from estate tax. Neither an individual nor the estate of a deceased individual is a small entity within the meaning of 5 U.S.C. 601(6). Accordingly, a regulatory flexibility analysis is not required.

Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Request for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written or electronic comments that are submitted timely (in the manner described under the **ADDRESSES** heading) to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at https://www.regulations.gov or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a hearing are strongly

encouraged to be submitted electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020-4, 2020-17 IRB 1, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

Statement of Availability of IRS Documents

Rev. Rul. 84-25, 1984-1 C.B. 191, and Announcement 2020-4, 2020-17 IRB 1, are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at https://www.irs.gov.

Drafting Information

The principal author of these proposed regulations is John D. MacEachen, Office of the Associate Chief Counsel (Passthroughs and Special Industries). Other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 20 is proposed to be amended as follows:

PART 20--ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Par. 1. The authority citation for part 20 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 20.2010-1 also issued under 26 U.S.C. 2001(g)(2) and 26 U.S.C. 2010(c)(6).

* * * * *

Par. 2. Section 20.2010-1 is amended by:

1. Adding paragraph (c)(3); and

2. Revising the first sentence of paragraph (f)(2) and adding a sentence after the second sentence.

The revision and additions read as follows:

§20.2010-1 Unified credit against estate tax; in general.

* * * * *

(c) * * *

(3) Exception to the special rule--(i) Transfers to which the special rule does not apply. Except as provided in paragraph (c)(3)(ii) of this section, the special rule of paragraph (c) of this section does not apply to transfers includible in the gross estate, or treated as includible in the gross estate for purposes of section 2001(b), including without limitation the following transfers:

(A) Transfers includible in the gross estate pursuant to section 2035, 2036, 2037, 2038, or 2042, regardless of whether all or any part of the transfer was deductible pursuant to section 2522 or 2523;

(B) Transfers made by enforceable promise to the extent they remain unsatisfied as of the date of death;

(C) Transfers described in §25.2701-5(a)(4) or §25.2702-6(a)(1) of this chapter; and

(D) Transfers that would have been described in paragraph (c)(3)(i)(A), (B), or (C) of this section but for the transfer, relinquishment, or elimination of an interest, power, or property, effectuated within 18 months of the date of the decedent's death by the decedent alone, by the decedent in conjunction with any other person, or by any other person.

(ii) Transfers to which the special rule continues to apply. Notwithstanding paragraph (c)(3)(i) of this section, the special rule of paragraph (c) of this section

applies to the following transfers:

(A) Transfers includible in the gross estate in which the value of the taxable portion of the transfer, determined as of the date of the transfer, was 5 percent or less of the total value of the transfer; and

(B) Transfers, relinquishments, or eliminations described in paragraph (c)(3)(i)(D) of this section effectuated by the termination of the durational period described in the original instrument of transfer by either the mere passage of time or the death of any person.

(iii) Examples. In each example, the basic exclusion amount on the date of the gift was $11.4 million, the basic exclusion amount on the date of death is $6.8 million, and both amounts include hypothetical inflation adjustments. The donor's executor does not elect to use the alternate valuation date and, unless otherwise stated, the donor never married and made no other gifts during life.

(A) Example 1. Individual A made a completed gift of A's promissory note in the amount of $9 million. The note remained unpaid as of the date of A's death. The assets that are to be used to satisfy the note are part of A's gross estate, with the result that the note is treated as includible in the gross estate for purposes of section 2001(b) and is not included in A's adjusted taxable gifts. Because the note is treated as includible in the gross estate and does not qualify for the 5 percent de minimis rule in paragraph (c)(3)(ii)(A) of this section, the exception to the special rule found in paragraph (c)(3) of this section applies to the gift of the note. The credit to be applied for purposes of computing A's estate tax is based on the $6.8 million basic exclusion amount as of A's date of death, subject to the limitation of section 2010(d). The result would be the same if A or a person empowered to act on A's behalf had paid the note within the 18 months prior to the date of A's death.

(B) Example 2. Assume that the facts are the same as in paragraph (c)(3)(iii)(A) of this section (Example 1) except that A's promissory note had a value of $2 million and, on the same date that A made the gift of the promissory note, A also made a gift of $9 million in cash. The cash gift was paid immediately, whereas the $2 million note remained unpaid as of the date of A's death. The assets that are to be used to satisfy the note are part of A's gross estate, with the result that the note is treated as includible in the gross estate for purposes of section 2001(b) and is not included in A's adjusted taxable gifts. Because the $2 million note is treated as includible in the gross estate and does not qualify for the 5 percent de minimis rule in paragraph (c)(3)(ii)(A) of this section, the exception to the special rule found in paragraph (c)(3) of this section applies to the gift of the note. On the other hand, the $9 million cash gift was paid immediately, and no portion of that gift is includible or treated as includible in the gross estate. Because the amount allowable as a credit in computing the gift tax payable on A's $9

million cash gift exceeds the credit based on the $6.8 million basic exclusion amount allowable on A's date of death, the special rule of paragraph (c) of this section applies to that gift. The credit to be applied for purposes of computing A's estate tax is based on a basic exclusion amount of $9 million, the amount used to determine the credit allowable in computing the gift tax payable on A's $9 million cash gift.

(C) Example 3. Assume that the facts are the same as in paragraph (c)(3)(iii)(A) of this section (Example 1) except that, prior to A's gift of the note, the executor of the estate of A's predeceased spouse elected, pursuant to §20.2010-2, to allow A to take into account the predeceased spouse's $2 million DSUE amount. Assume further that A's promissory note had a value of $2 million on the date of the gift, and that A made a gift of $9 million in cash a few days later. The cash gift was paid immediately, whereas the $2 million note remained unpaid as of the date of A's death. The assets that are to be used to satisfy the note are part of A's gross estate, with the result that the note is treated as includible in the gross estate for purposes of section 2001(b) and is not included in A's adjusted taxable gifts. Because A's DSUE amount was sufficient to shield the gift of the note from gift tax, no basic exclusion amount was applicable to the $2 million gift pursuant to paragraph (c)(1)(ii)(A) of this section and the special rule of paragraph (c) of this section does not apply to that gift. On the other hand, the $9 million cash gift was paid immediately, and no portion of that gift is includible or treated as includible in the gross estate. Because the amount allowable as a credit in computing the gift tax payable on A's $9 million cash gift exceeds the credit based on the $6.8 million basic exclusion amount allowable on A's date of death, the special rule of paragraph (c) of this section applies to that gift. The credit to be applied for purposes of computing A's estate tax is based on A's $11 million applicable exclusion amount, consisting of the $2 million DSUE amount plus the $9 million amount used to determine the credit allowable in computing the gift tax payable on A's $9 million cash gift.

(D) Example 4. Individual B transferred $9 million to a grantor retained annuity trust (GRAT), retaining a qualified annuity interest within the meaning of §25.2702-3(b) of this chapter valued at $8,550,000. The taxable portion of the transfer valued as of the date of the transfer was $450,000. B died during the term of the GRAT. The entire GRAT corpus is includible in the gross estate pursuant to §20.2036-1(c)(2). Because the value of the taxable portion of the transfer was 5 percent or less of the total value of the transfer determined as of the date of the gift, the 5 percent de minimis rule in paragraph (c)(3)(ii)(A) of this section is met and the exception to the special rule found in paragraph (c)(3) of this section does not apply to the gift. However, because the total of the amounts allowable as a credit in computing the gift tax payable on B's post-1976 gift of $450,000 is less than the credit based on the $6.8 million basic exclusion amount allowable on B's date of death, the special rule of paragraph (c) of this section does not apply to the gift. The credit to be applied for purposes of computing B's estate tax is based on the $6.8 million basic exclusion amount as of B's date of death, subject to the limitation of section 2010(d).

(E) Example 5. Assume that the facts are the same as in paragraph (c)(3)(iii)(D) of this section (Example 4) except that B's qualified annuity interest is valued at $8 million. The taxable portion of the transfer valued as of the date of the transfer was $1 million. Because the value of the taxable portion of the transfer was more than 5 percent of the total value of the transfer determined as of the date of the gift, the 5 percent de minimis rule in paragraph (c)(3)(ii)(A) of this section is not met and the exception to the special rule found in paragraph (c)(3) of this section applies to the gift. The credit to be applied for purposes of computing B's estate tax is based on the $6.8

million basic exclusion amount as of B's date of death, subject to the limitation of section 2010(d).

(F) Example 6. Assume that the facts are the same as in paragraph (c)(3)(iii)(D) of this section (Example 4) except that B's qualified annuity interest is valued at $2 million. The taxable portion of the transfer valued as of the date of the transfer was $7 million. B survived the term of the GRAT. Because B survived the original unaltered term of the GRAT, no part of the value of the assets transferred to the GRAT is includible in B's gross estate, and the exception to the special rule found in paragraph (c)(3) of this section does not apply to the gift. Moreover, because the amount allowable as a credit in computing the gift tax payable on B's $7 million gift exceeds the credit based on the $6.8 million basic exclusion amount allowable on B's date of death, the special rule of paragraph (c) of this section applies to the gift. The credit to be applied for purposes of computing B's estate tax is based on a basic exclusion amount of $7 million, the amount used to determine the credit allowable in computing the gift tax payable on B's transfer to the GRAT.

(G) Example 7. Individual C transferred $9 million to a grantor retained income trust (GRIT), retaining an income interest valued at $0 pursuant to section 2702(a)(2)(A). The taxable portion of the transfer valued as of the date of the transfer was $9 million. C died during the term of the GRIT. The entire GRIT corpus is includible in C's gross estate pursuant to section 2036(a)(1) because C retained the right to receive all of the income of the GRIT. Because the transferred assets are includible in the gross estate and do not qualify for the 5 percent de minimis rule in paragraph (c)(3)(ii)(A) of this section, the exception to the special rule found in paragraph (c)(3) of this section applies to the gift. The credit to be applied for purposes of computing C's estate tax is based on the $6.8 million basic exclusion amount as of C's date of death, subject to the limitation of section 2010(d).

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(f) * * *

(2) Exceptions. Except as specifically provided in this paragraph (f)(2), paragraphs (c) and (e)(3) of this section apply to estates of decedents dying on or after November 26, 2019. * * * Paragraph (c)(3) of this section is applicable to the estates of decedents dying on or after [**INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. * * *

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